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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/502,082	07/22/2004	Nils Cornelis Sips	7393/8-4061	8981
43798 7590 02/18/2010 FITCH, EVEN, TABIN & FLANNERY P. O. BOX 18415 WASHINGTON, DC 20036				
EXAMINER STULIL, VERA				
ART UNIT		PAPER NUMBER		
1794				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/502,082

**Applicant(s)**

SIPS ET AL.

**Examiner**

VERA STULII

**Art Unit**

1794

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 05 October 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-7, 9, 16-18 and 21-25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-7, 9, 16-18 and 21-25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB-06)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-7, 9, 16-18 and 21-25 are rejected under 35 U.S.C. 103(a) as being obvious over Kettlitz et al in view of Daenzer-Alloncle et al (6,139,896) essentially for the same reasons as stated in the Non-Final Office action mailed 07/07/2009.

In regard to the newly added claim 25, claim 25 is rejected for the same reasons as claim 7.

In regard to the newly amended claim 22, the claim is rejected for the same reasons as claim 1. In regard to the newly added recitation of the method steps of preparation of the UHT-treated product in claim 22, it is noted that "[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) (see MPEP 2113).

### ***Response to Arguments***

Applicant's arguments filed 10/05/2009 have been fully considered but they are not persuasive.

On page 7 of the Reply Applicants state that:

The prior art does not teach (A) "wherein, after UHT-treatment, said UHT-treated product has a viscosity between 0.10 to 0.50 times the viscosity obtainable after re-heating of said UHT- treated product" as in claim 1; "wherein the UHT-treated product has a viscosity that increases upon reheating, and whereby the viscosity is 0.15 to 0.50 times the viscosity obtained after reheating the UHT-treated product in step (f)" as in claim 22; or "said product has been UHT-treated before reheating to obtain a UHT-heated product, and said UHT-heated product has a viscosity that is below 1500 mPa.s and is 0.15 to 0.50 times the viscosity of said reheated food product, said reheated food product having a viscosity above 2000 mPa.s" as in claim 24.

In response to this argument, it is noted that regarding particular viscosity recitations after re-heating in claims 1, 2, 5, 7 and 21, 23-24, although the references do not specifically disclose every possible quantification or characteristic of its product, such as viscosity after re-heating, this characteristic would have been expected to be in the claimed range absent any clear and convincing evidence and/or arguments to the contrary (see also arguments regarding particular viscosity on page 8 of the Reply). The combination of references disclose the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of the ordinary skill in the art would recognize that the viscosity after re-heating, among many other characteristics of the product obtained by referenced method, would have been an inherent result of the process disclosed therein. The Patent Office does not possess the facilities to make and test the referenced method and product obtain by such method, and as reasonable reading of the teachings of the references has been applied to establish the case of obviousness, the burden thus shifts to applicant to demonstrate otherwise.

On page 8 of the Reply Applicants state that:

Kettlitz would not have suggested an increase in viscosity as recited in claims 1, 22 or 24. Kettlitz discloses stabilized starches that *maintain/retain* their pre-existing viscosity even after *reheating*.

Examiner respectfully disagrees. As stated by Applicants in the specification "[for] obtaining the stabilized starch n-alkenyl succinate, the starch n-alkenyl succinate can be treated with active chlorine and can be prepared according to the process described in EP 0811633". Thus Applicants admit that the starches used in the present inventions can be prepared according to the process described in EP 0811633. It is further noted that EP 0811633 was also published as US 6,235,894, which is used as a main reference in the instant rejection. Therefore, it is not seen how Kettlitz '894 teaches away from the presently claimed invention, when in fact, Kettlitz '894 disclose the same starches as claimed by Applicants.

On page 8 of the Reply Applicants state that "The prior art does not teach "a UHT-treated product comprising a stabilized starch n-alkenyl succinate as a texturizing agent...". On page 9 and 10 of the Reply Applicants state that "[i]n short, a person of ordinary skill in the art would have had no incentive or reason to select for UHT-treated products that particular starch of Kettlitz for use in Daenzer-Alloncle, nor selecting it for solving Applicants' problem" and that "[t]here is no factual evidence cited in the Office Action to show what would be the appearance of the product if a starch according to Kettlitz was used in Daenzer-Alloncle". In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re*

*Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). As stated in the Office action mailed July 11, 2008 and above, Kettlitz '894 disclose the same starches as claimed by Applicants. Kettlitz et al disclose that highly swollen (viscous) cooking stable starches are used in many different applications, for example in the preparation of soups, sauces, meat products, dressings, micro-wavable food and in the preparation of bakery creams and fillings, in convenience foods that need to have a high viscosity and smooth texture after heating (to 80-100°C) (Col. 1 lines 46-50). Kettlitz et al disclose that stabilized high viscosity starches are particularly suitable for the mentioned applications (Col. 1 lines 51-53). Kettlitz et al disclose stabilized starch n-alkenyl succinate (Col. 2 lines 55-56) and stabilized starch n-octenyl succinate (Col. 2 lines 56-57). Kettlitz et al disclose soups, sauces, meat products, dressings, micro-wavable food, bakery creams and fillings (Col. 1 lines 46-50). Kettlitz et al do not specifically disclose UHT treatment of the food products. However, Kettlitz et al disclose use of stabilized starch n-alkenyl succinate in the food products that normally undergo UHT/high-temperature/sterilization/ pasteurization treatment. Daenzer-Alloncle et al disclose a lactic cream which has been treated by an ultra-high temperature ("UHT") treatment or other sterilization procedure or by pasteurization to provide a cream product for unrefrigerated storage and which contains between 1.5 and 4% by weight of modified starch for controlling viscosity, so that the composition has a viscosity between 250 and 1600 mPas (Abstract). Since Daenzer-Alloncle et al disclose use of modified starch as a viscosity component in a cream product that undergoes heat treatment, and Kettlitz et al disclose use of heat stable high

viscosity starches in preparation of cream products, one of ordinary skill in the art would have been motivated to employ heat stable high viscosity starches in preparation of cream products as taught by Daenzer-Allonde et al. One of ordinary skill in the art would have been motivated to do so, since both Kettlitz et al and Daenzer-Allonde et al. disclose use of modified starch as a viscosity component; foods that undergo UHT/high-temperature/sterilization/ pasteurization treatment; and the importance of heat stability of starches.

On page 9 of the Reply Applicants state that "Applicants submit Kettlitz would not have been combined with Daenzer-Allonde because a fluid lactic cream product is not even meant to be reheated. In response to this argument, it is noted that Daenzer-Allonde et al is relied upon as a teaching of use of modified starch as a viscosity controlling component in a cream product that undergoes ultra-high temperature ("UHT") treatment. Product as disclosed by Kettlitz (soups, sauces, meat products, dressings, micro-wavable foods, bakery creams and fillings) were well known to be reheated again before consumption. Therefore, the change in the viscosity after reheating is the inherent result of the use of the starch n-alkenyl succinate as texturizing agents in these products absent any clear and convincing evidence and/or arguments to the contrary.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to VERA STULII whose telephone number is (571)272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/  
Primary Examiner, Art Unit 1794

/Vera Stulii/  
Examiner, Art Unit 1794